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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

RALPH DE SIMONE,
Petitioner,

-against-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the refusal of the district court to suppress the product of certain electronic surveillance upon the ground that the monitoring agents unlawfully exceeded the scope of the order authorizing the eavesdropping "bug," deprived petitioner of his Fourth Amendment rights?

The petitioner Ralph De Simone respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 6th, 1980.

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OPINIONS BELOW

The order of the Court of Appeals appears in the Appendix hereto at p. 1a. The order denying rehearing appears in the Appendix hereto at p. 5a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 6th, 1980. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on September 12th, 1980, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fourth Amendment to the United States Constitution states as follows:

> "Amendment IV—Searches and Seizures
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The indictment in the case at bar charged petitioner, among others, with various narcotics offenses. At trial, the government introduced extensive evidence obtained through electronic surveillance. Petitioner's pre-trial mo-

tion to suppress this evidence upon the grounds that the surveillance was conducted in violation of state and federal law regulating electronic eavesdropping was denied by the district court. The facts pertinent to the issue raised herein may be briefly summarized as follows.

The fruits of the court-authorized electronic surveillance stemmed from three sources. 1) An eavesdropping "bug" for a trailer known as Pat-Mar Auto Sales located in the Bronx, New York; 2) a wiretap on the pay telephone located in the Pat-Mar trailer; and 3) a wiretap on the telephone located in co-conspirator Anthony Pagliuca's residence.

Petitioner De Simone's challenge to the admissibility of this evidence rested upon the contention that the state authorities improperly monitored the Pat-Mar trailer bug. Petitioner asserted that the monitoring officers deliberately and intentionally exceeded the scope of the initial eavesdropping order for the Pat-Mar bug, which authorized *face-to-face communications* in the Pat-Mar trailer between Anthony Pagliuca and his accomplices and co-conspirators concerning heroin. The contravention of the order consisted of the recordation of one-sided portions of three telephone conversations to which Anthony Pagliuca was a party in the Pat-Mar trailer. The conversations at issue occurred on August 15th, 24th and 26th, 1977.

The record unequivocally established that the authorities were fully aware of the pay telephone located in the Pat-Mar trailer at the time that they applied for the Pat-Mar bug.

REASONS FOR GRANTING THE WRIT

THE CORRECTNESS OF THE DECISION BELOW IS OPEN TO SERIOUS QUESTION.

Petitioner De Simone respectfully contends that contrary to the reasoning of the courts below, the "plain view" doctrine is in apposite in the case at bar because the interceptions in question were unlawful *ab initio.* The original eavesdropping warrant for the Pat-Mar bug was purposefully restricted exclusively to interception of face-to-face communications in the Pat-Mar trailer between Anthony Pagliuca and his accomplices and co-conspirators concerning heroin. The order delineated specific individuals, specific subject matter and, most significantly, a specific type of communications; those which occurred face-to-face.

Within the context of electronic eavesdropping, the "plain view" doctrine is only triggered when evidence is inadvertently discovered in the course of lawful interception of communications and an inadvertent conversation was overheard in good faith. Under such circumstances, retroactive amendment of the warrant is legally permissible. See, *People v. De Stefano,* 38 N.Y. 2d 640, 382 N.Y.S.2d 5 (1976). In the instant case, however, the conversations were not overheard inadvertently. Police officers here, fully aware that telephone conversations were beyond the scope of the warrant, deliberately continued their monitoring because the conversation seemed pertinent to their investigation. Furthermore, it cannot be disputed that the authorities were fully aware of the pay telephone located in the Pat-Mar trailer at the time that they applied for the Pat-Mar bug. Under these circumstances, it was wholly foreseeable that Anthony Pagliuca, the named subject, would be engaged in telephone conversations, as well as face-to-face com-

munications, while inside the Pat-Mar trailer. Yet, the authorities applied for, and the judge issued, an eavesdropping warrant limited solely to face-to-face communications.

Assuming *arguendo* that the authorities lacked probable cause to seek a wiretap for the telephone located in the Pat-Mar trailer at the time that they applied for the Pat-Mar bug, they should not be permitted to utilize interceptions which directly contravened the terms of the bug order to supply the probable cause which they lacked for the telephone tap. An examination of the papers submitted in support of the application for the Pat-Mar phone tap reveals that the three challenged interceptions formed a critical portion of the probable cause alleged therein. Such bootstrapping should not receive judicial sanction, particularly in light of this Court's continuing emphasis upon careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits. *United States v. Giordano,* 516 U.S. 505, 94 S. Ct. 1820 (1974).

In support of the instant petition, petitioner De Simone respectfully submits that the question presented is one of great importance. It cannot be disputed that courts and legislators alike have become increasingly aware of the dangers inherent in unbridled utilization of eavesdropping techniques. As this Court declared in *Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873 (1967):

> "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." 388 U.S. at 62-3.

Consideration of this Court is, therefore, necessitated to preserve the fundamental constitutional safeguards embodied in the panoply of statutes and procedures governing electronic surveillance.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

RONALD P. FISCHETTI
Counsel for Petitioner
RALPH DE SIMONE

ANNE C. FEIGUS
Of Counsel

November 10, 1980

APPENDIX "A"
ORDER AFFIRMING PETITIONER DE SIMONE'S CONVICTION, DATED AUGUST 6th, 1980

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of August, one thousand nine hundred and eighty.

Present:

Hon. James L. Oakes,
Hon. Ellsworth A. VanGraafeiland,
Circuit Judges.
Hon. Jack B. Weinstein,
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v.

SAVERIO SCHIFANO, ANTHONY PAGLIUCA
RALPH DE SIMONE,

Appellants.

Three appellants here appeal from drug convictions in the United States District Court for the Southern District of New York before Judge Charles E. Stewart, Jr. We affirm.

Appellant DeSimone, who is joined by appellant Pagliuca on all applicable points, argues first that it was illegal to record Pagliuca's side of three phone conversations through a "bug" placed in the Pat-Mar trailer where the conspiracy had its headquarters. Although the warrant

for the bug did specify "face-to-face communications," a fair reading suggests that these three conversations fell within its terms. The main purpose of the requirement that a warrant specify the "type of communication" to be intercepted is to limit interceptions to conversations about particular offenses. *See United States v. Tortorello,* 480 F.2d 764, 779-80 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973). Here, the three phone calls did relate to the conspiracy under investigation. The "face-to-face" reference was probably intended to indicate that this would be a bug for recording statements in the trailer, not a tap on a phone line.

In any event, the "plain view" (or more accurately the "plain hearing") doctrine amply supports the Government's position. Although the agents knew there was a phone in the trailer, and could have speculated that Pagliuca would make drug-related calls, such speculation falls short of the "probable cause" needed to negate a finding that the interception of the calls was "inadvertent." *See United States v. Liberti,* 616 F.2d 34, 37 (2d Cir. 1980), *petition for cert. filed,* 48 U.S.L.W. 3585 (U.S. Feb. 25, 1980). In sum, there was no illegality here and no evidentiary hearing was required.

DeSimone's argument that there was unconstitutional preindictment delay is also unavailing. He failed to offer any substantial evidence of federal involvement in the original investigation. Even if he had offered such evidence, and even if this were enough to trigger Sixth Amendment Speedy Trial rights as of the date of the state arrest (as this circuit has never held, *see United States v. Lai Ming Tanu,* 589 F.2d 82 (2d Cir. 1978)), appellant has still failed to allege sufficient prejudice to prevail under the balancing test of *Barker v. Wingo,* 407 U.S. 514, 530 (1972). It is simply not enough in this case to assert that the delay caused anxiety and a dimming of memory. For similar reasons, the due process claim raised by DeSimone

is deficient. Since he was facing State prosecution during most of this pre-indictment period, it is hard to see how any delay hampered the preparation of his defense. He has also failed to show that the Government delayed the prosecution in order to gain some tactical advantage. *See United States v. Lovasco,* 431 U.S. 783 (1977).

DeSimone claims in addition that the district court abused its discretion in not granting him a severance in order to permit codefendant Pagliuca to testify in his favor. We reject this claim principally because one of the four factors to be considered in this area, *see United States v. Taylor,* 562 F.2d 1345, 1362 (2d Cir.), *cert. denied,* 432 U.S. 909 (1977), is the vulnerability of the proposed testimony to impeachment. Here, impeachment would have come from recorded statements linking DeSimone to the conspiracy and from the eyewitness testimony of Campbell. Judge Stewart could also consider the high likelihood that Pagliuca would be convicted in the prior trial, becoming impeachable on that ground as well. In such a setting, keeping in mind the relevant consideration of judicial economy, there was certainly no abuse of discretion in the denial of severance.

Appellant Schifano's arguments must all be rejected as well. The Government put in evidence a whole series of taped conversations in which Stefano discusses drug transactions. Despite whatever quibbles might be raised about the proper interpretation of particular words or phrases, these tapes provided ample non-hearsay evidence supporting the admission against Schifano of co-conspirator testimony under *United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). There was also sufficient evidence overall to support the jury's verdict against this appellant. As for Schifano's severance argument, premised on the fact that much of the evidence at trial did not relate to him, he has failed to make the "clear showing of prejudice" required when

there is a joint trial involving a common scheme or plan. *United States v. Girard*, 601 F.2d 69, 72 (2d Cir.), *cert. denied*, 100 S. Ct. 148 (1979). The fact that Schifano did not participate in all, or even most, of the overt acts described by the witnesses is not sufficient to require a separate trial.

Convictions affirmed.

s/James L. Oakes
JAMES L. OAKES

s/Ellsworth A. Vangraafeiland
ELLSWORTH A. VANGRAAFEILAND,
Circuit Judge

s/Jack B. Weinstein
JACK B. WEINSTEIN,
District Judge

APPENDIX "B"
ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*, DATED SEPTEMBER 12th, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of September, one thousand nine hundred and eighty

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT DENOIA, SAVERIO SCHIFANO, ANTHONY PAGLIUCA, RALPH DeSIMONE

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Ralph Di Simone, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Wilfred Feinberg
Chief Judge